

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-156 (Sub-No. 26X)

DELAWARE AND HUDSON RAILWAY COMPANY, INC., D/B/A CANADIAN PACIFIC  
RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN ALBANY COUNTY, NY

Decided: June 30, 2008

Delaware and Hudson Railway Company, Inc., d/b/a Canadian Pacific Railway Company (D&H) filed a notice of exemption under 49 CFR 1152 Subpart F—Exempt Abandonments to abandon 1.98 +/- miles of rail line between mileposts A 6.95 +/- (in the Town of Colonie (Colonie)) and A 7.13 +/- and mileposts T 0.0 +/- and T 1.81 +/- (in Green Island), in Albany County, NY. Notice of the exemption was served and published in the Federal Register on June 1, 2007 (72 FR 30665-66). The exemption was scheduled to become effective on July 3, 2007, unless stayed by the Board or a formal expression of intent to file an offer of financial assistance (OFA) under 49 U.S.C. 10904 and 49 CFR 1152.27(c)(2) was filed by June 11, 2007.

OFA Proceeding

On May 17, 2007, R. Freedman & Son, Inc. (Freedman), filed a formal expression of intent to file an OFA to purchase the line proposed for abandonment (which automatically stayed the effective date of the exemption for 10 days, until July 13, 2007)<sup>1</sup> and requested that D&H provide Freedman with the financial data and information prescribed in 49 CFR 1152.27(a) (requested information). To give D&H time to provide Freedman with the requested information, the Board, by decision served on June 15, 2007, extended the due date for Freedman to file an OFA until August 20, 2007, and extended the effective date of the exemption until August 30, 2007. By decision served on August 6, 2007, the deadline for OFAs to be filed was tolled until 30 days after D&H notified the Board that it had provided the requested information to Freedman, and the effective date of the abandonment exemption was postponed until 10 days after the new due date for OFAs.

In a letter filed on August 31, 2007, D&H advised the Board that it provided Freedman with the requested information, but explained that Freedman had requested additional information, and that D&H would need additional time to comply with Freedman's additional request. Following notice by D&H that it had provided Freedman with the additional information, the Board, in a decision served on September 27, 2007, tolled the deadline for OFAs to be filed for an additional 30 days, and the effective date of the exemption was further

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<sup>1</sup> See 49 CFR 1152.27(c)(2)(i).

postponed until 10 days after the due date for OFAs. On November 1, 2007, D&H provided the additional requested information to Freedman, which made OFAs due on November 30, 2007.

On November 30, 2007, Freedman filed an OFA under 49 U.S.C. 10904 and 49 CFR 1152.27 to purchase an approximate 1.05-mile portion of D&H's line proposed for abandonment, extending from milepost A 6.95 +/- in Colonie where it connects with the D&H main line to approximately milepost T 1.52 (adjacent to Freedman's facilities in Green Island).

By decision served on December 5, 2007 (December 2007 decision), Freedman was found to be financially responsible and the effective date of the exemption authorizing abandonment was postponed to permit the OFA process to proceed. In the same decision, the Board made any request to establish the terms and conditions of the purchase price due on or before December 31, 2007 (December 31 deadline). At the parties' request, by decision served on December 28, 2007, the Board extended the December 31 deadline, until March 31, 2008. Again, at the parties' request, by decision served on March 25, 2008 (March 25 decision), the Board held the proceeding in abeyance until June 30, 2008. The March 25 decision also directed the parties to submit a status report to the Board on or before June 20, 2008.

By motion filed on June 3, 2008, Freedman now seeks to withdraw its OFA. Freedman states that, as a result of negotiations between Freedman and the Village of Green Island (Village),<sup>2</sup> an agreement has been reached whereby Freedman has agreed to relinquish its OFA. Freedman indicates that D&H has been apprised of the agreement and that D&H has no objection to Freedman's request to withdraw its OFA. Accordingly, Freedman's motion to withdraw its OFA will be granted, and the OFA process prescribed in the December 2007 decision will be terminated. The December 2007 decision will be vacated, and the exemption, as modified below, will be permitted to go into effect on the service date of this decision and notice of interim trail use or abandonment.

### Environmental Conditions

The Board's Section of Environmental Analysis (SEA) served an environmental assessment (EA) in this proceeding on June 6, 2007. In the EA, SEA recommends three conditions. First, SEA notes that D&H indicates that no known toxic waste areas are present within the right-of-way and that all batteries have been removed from the signal bungalows at the five at-grade crossings. According to D&H, a Phase 1 Environmental Site Assessment was completed in October 2006, in which no "Recognized Environmental Conditions" were found,

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<sup>2</sup> In the March 25 decision, the Board noted that the Village secured an order to show cause asking a New York court to adjudicate certain issues regarding a settlement stipulation entered into between Freedman and the Village 4 years ago. The Village had argued that the terms of the settlement stipulation would prevent Freedman from acquiring the line proposed for abandonment or from building a new side track from its facility to that line, which Freedman had denied.

meaning that the right-of-way was found to be free of toxic waste. D&H, however, notes that there is a hazardous waste site proximate to the line originating from a Ford Motor Company facility (Ford facility), which has been designated by the New York State Department of Environmental Conservation (NYDEC) as Site No. 401007. D&H indicates to SEA that it will consult with NYDEC prior to commencement of any work near that area. Accordingly, SEA recommends that D&H be required, prior to the commencement of salvage operations, to consult with NYDEC to ensure that any concerns regarding D&H's salvage activities in the vicinity of the Ford facility are addressed, and to submit the results of these consultations in writing to SEA.

Second, SEA notes that, in a letter dated March 29, 2007, Ms. Mary Brizzell, Town Supervisor of Colonie, submitted the following concerns regarding D&H's proposed abandonment: (1) what structures would remain in place to facilitate transit use; (2) the ownership and maintenance of said structures; (3) the assessment of potential impacts to businesses, including rail to truck diversions; (4) the identification and remediation of potential contamination sites; (5) the disposal of equipment and materials; and (6) potential impacts to other connecting rail lines or spurs. Accordingly, SEA recommends that D&H be required to consult with Colonie, prior to commencement of salvage activities, to clarify and discuss Colonie's concerns regarding D&H's proposed abandonment.

Lastly, SEA notes in the EA that the U.S. Department of Commerce, National Geodetic Survey (NGS), has not completed its review of the proposed abandonment. Accordingly, SEA recommends that D&H be required, prior to beginning salvage activities, to consult with NGS, and, if NGS identifies geodetic station markers that may be affected by the proposed abandonment, D&H shall notify NGS at least 90 days prior to beginning salvage activities to plan for the possible relocation of the geodetic station markers.

No comments to the EA were received by the June 21, 2007 due date, and, to date, no additional comments have been filed. Accordingly, the conditions recommended by SEA in the EA will be imposed.

#### Trail Use and Public Use

SEA indicates in the EA that, according to D&H, the right-of-way is suitable for other alternative use following abandonment. In a June 11, 2007 filing (June 11 filing), the New York State Office of Parks, Recreation and Historic Preservation (NYPRHP) requests the issuance of a notice of interim trail use (NITU) for the line pursuant to section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and 49 CFR 1152.29. NYPRHP has submitted a statement of willingness to assume financial responsibility for the management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way, as required at 49 CFR 1152.29, and has acknowledged that the use of the right-of-way for trail purposes is subject to

future reactivation for rail service. In a response filed on June 10, 2008, D&H states that it is willing to negotiate with NYPRHP for interim trail use.

Because NYPRHP's request complies with the requirements of 49 CFR 1152.29 and D&H is willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement during the 180-day period prescribed below. If the parties reach a mutually acceptable final agreement, no further Board action is necessary. If no agreement is reached within 180 days, D&H may fully abandon the line subject to any outstanding conditions. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

In the June 11 filing, NYPRHP also requests a 180-day public use condition under 49 U.S.C. 10905. NYPRHP requests that D&H be prohibited from disposing of the corridor, other than tracks, ties, and signal equipment, except for public use on reasonable terms, and that D&H be barred from removing or destroying any potential trail-related structures, such as bridges, trestles, culverts, and tunnels, for a 180-day period from the effective date of the abandonment exemption. NYPRHP states that the time period is needed to evaluate the rail corridor for potential trail use and to commence negotiations with the carrier.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of-Way As Trails, 2 I.C.C.2d 591, 609 (1986). Under section 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days from the effective date of the abandonment exemption.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. See 49 CFR 1152.28(a)(2). Because NYPRHP has satisfied these requirements, a 180-day public use condition will be imposed, commencing from June 30, 2008, the effective date of the exemption.

When the need for interim trail use/rail banking and public use is shown, it is the Board's policy to impose both conditions concurrently, subject to the execution of a trail use agreement. If a trail use agreement is reached on a portion of the right-of-way, D&H must keep the remaining portion intact for the remainder of the 180-day period to permit public use negotiations. Also, a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, D&H is not required to deal exclusively with NYPRHP, but may engage in negotiations with other interested persons.

As conditioned, this decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. Freedman's motion to withdraw its OFA is granted.
3. The December 2007 decision is vacated to the extent necessary to permit the abandonment exemption in this proceeding to become effective on June 30, 2008, and the OFA process in this proceeding is terminated.
4. Upon reconsideration, the notice served and published in the Federal Register on June 1, 2007, exempting the abandonment of the line described above is subject to the conditions that, prior to commencement of salvage activities, D&H shall: (1) consult with NYDEC to ensure that any concerns regarding D&H's salvage activities in the vicinity of the Ford facility are addressed, and to submit the results of these consultations in writing to SEA; (2) consult with Colonie to clarify and discuss Colonie's concerns regarding D&H's proposed abandonment; and (3) consult with NGS, and, if NGS identifies geodetic station markers that may be affected by the proposed abandonment, D&H shall notify NGS at least 90 days prior to beginning salvage activities to plan for the possible relocation of the geodetic station markers. The exemption is also modified to the extent necessary to permit public use negotiations as set forth below, for a period of 180 days commencing from the service date of this decision and notice of interim trail use or abandonment (until December 27, 2008), and to implement interim trail use/rail banking as set forth below to permit NYPRHP to negotiate with D&H for trail use of the subject line, for a period of 180 days from the service date of this decision and notice of interim trail use or abandonment (until December 27, 2008).
5. Consistent with the public use and interim trail use/rail banking conditions and other conditions imposed in this decision and notice, D&H may discontinue service and salvage track and related materials. D&H shall keep intact the right-of-way, including bridges, trestles, culverts, and tunnels, for a period of 180 days (until December 27, 2008), to enable any state or local government agency, or other interested person, to negotiate the acquisition of the line for public use. If an interim trail use/rail banking agreement is executed before the 180-day period specified above, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line.
6. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.
7. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

8. If interim trail use is implemented, and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

9. If an agreement for interim trail use/rail banking is reached by December 27, 2008, interim trail use may be implemented. If no agreement is reached by that time, D&H may fully abandon the line provided the other conditions imposed in this proceeding are met. See 49 CFR 1152.29(d)(1).

10. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Anne K. Quinlan  
Acting Secretary